IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: **Timothy E. Grib and Michael A. Brown**
Assignee: **WILTEL COMMUNICATIONS GROUP, INC.**
Application No.: **09/964,232**   Group Art Unit: **2143**
Filed: **September 26, 2001**   Examiner: **Kyung H. Shin**
For: **METHOD AND APPARATUS FOR PERFORMANCE MEASUREMENT OF DIFFERENT NETWORK ROUTES BETWEEN DEVICES**

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Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

ACCOMPANYING ARGUMENTS FOR PRE-APPEAL BRIEF REQUEST FOR REVIEW

Sir:

In light of the following remarks, Appellants respectfully request review and reversal of the final rejection in the above-referenced application. No amendments are being filed with this Request, and this Request is being filed concurrently with a Notice of Appeal. In the Final Office Action mailed October 28, 2008 the Examiner rejected claims 1-29. Claims 1-29 remain pending in the present application. Appellants respectfully request reconsideration of the pending claims in view of the following remarks.

Present Status of Claims

Claims 1-29 are pending in the application. Of these claims:

1. Claim 15 stands finally rejected under 35 U.S.C. §101 as being directed to non-statutory subject matter;

2. Claims 1-4 and 15-17 stand finally rejected under 35 U.S.C. §102(e) as being anticipated by U.S. Patent No. 5,627,766 to Beaven, et al. ("Beaven '766"); and

3. Claims 5-9, 13, and 18-29 stand finally rejected under 35 U.S.C. §103(a) as being unpatentable over Beaven '766 in view of U.S. Patent No. 6,763,380 to Mayton ("Mayton '380").

Legal Error in Rejections of Independent Claims 1, 15, 16, and 21

In the Final Office Action, the Examiner rejected claims 1-4, and 15-17 under 35 U.S.C. §102(e) as being anticipated by United States Patent No. 5,627,766 issued to Paul A. Beaven, May 6, 1997 (hereinafter "Beaven"). The Examiner further rejected claims 5-9, 13, and 18-29 under 35 U.S.C. §103(a) as being unpatentable over Beaven in view of United States Patent No. 6,763,380 issued to Kim Irvin Mayton, et al., July 13, 2004 (hereinafter "Mayton"). Appellants respectfully traverse these rejections.

The rejection failed to address all elements of independent claims 1, 15, and 16.

Independent claims 1, 15, and 16 recite conducting a first performance test of a first type over a first path of the plurality of paths between a first and second device and conducting a second performance test of the first type over a second path of the plurality of paths between the first and second device wherein a processor initiates the simultaneous execution of the first and the second non-sequential performance tests.

The Examiner relied on Beaven to anticipate the aforementioned claim recitations. See Final Office Action, pages 7, 9, and 10. However, unlike the language recited in claims 1, 15, and 16, Beaven fails to describe *processor initiated* simultaneous execution of a *first* performance test of a first type and a *second* performance test of the first type over a first and second path between a first and a second device. Beaven describes monitoring a network from a single point of control (POC). *See* Beaven, col. 2, lines 40-44. This POC transmits a test to a single node test program entity (NTP). *See* Beaven, col. 2, lines 45-49; col. 3, lines 4-7. The single NTP then transmits a reply message to the POC and forwards the original transmission from the POC to other NTPs. *Id.* at col. 2, lines 50-54; col. 3, lines 10-16. These NTPs then transmit reply messages to the POC while forwarding on the original transmission from the POC to subsequent NTPs. *Id.* at 55-59; col. 3, lines 10-16. The key aspect of this system is that the POC initially injects a *single* test message into the network as a performance test from a *single* POC. *See* Beaven, col. 4, lines 5-8.

Indeed, Beaven specifically describes initialization of a second test as occurring at a *different node*, i.e. POC, from the POC that originated the initial test, stating that the disclosure provides for enabling "multiple tests initiated *at different nodes* to be running simultaneously." *See* Beaven, col. 4, lines 11-12 (emphasis added). Thus, unlike the recitations of independent claims 1, 15, and 16, Beaven fails to describe conducting a first test of a first type along a first path, and a second test of a first type along a second path from a processor, i.e. a single point, because simultaneous tests are described by Beaven as being initiated at *different points*, i.e., nodes. Thus, although Beaven may describe initiating a single test that may be dispersed into multiple tests after being received by the initial NTP, the tests are originated at *separate* POCs and thus, Beaven cannot be read as describing *processor initiated* simultaneous execution of a *first* performance test of a first type and a *second* performance test of the first type over a first and second path between a first and a second device as recited by independent claims 1, 15, and 16.

Furthermore, Beaven fails to describe a processor *initiates the simultaneous execution* of the first and the second non-sequential performance tests. Even if, *arguendo*, the argument set forth by the Examiner that "it is well known in the art that a processor is required to initiate a task such as a performance test between two network connected nodes" (*see* Final Office Action, page 5) were to be shown to be valid, Beaven still fails to describe *initiation of the simultaneous execution* of the first and the second non-sequential performance tests.

For example, if one were to assume that the POC of Beaven was a processor, then, as shown above, the POC may be a processor that initiates a test to a single node test program entity (NTP), which subsequently transmits a reply message to the POC and forwards the original transmission from the POC to other NTPs. *See* Beaven, col. 2, lines 45-54; col. 3, lines 4-7 and 10-16. Morever, Beaven details that additional tests may be initiated at different nodes, i.e. POCs, which based on the Examiner's reading, would be secondary processors. *See* Beaven, col. 4, lines 11-13. Based on these executed tests,

simultaneous *monitoring* of network paths may be accomplished via the multiple POCs. *See id.*, lines 9-13.

However, simultaneous *monitoring* of multiple nodes does anticipate simultaneous *execution* of performance. For example, a first test may be initiated at some first time T1, and a second test may be initiated at a later second time T2. Subsequent to T2, simultaneous *monitoring* of the tests may occur, but this simultaneous *monitoring* does not equate with simultaneous *execution* of the tests. Thus, Beaven fails to anticipate both initiation of tests from a single point, i.e. a processor, as well as *simultaneous execution* of the first and the second non-sequential performance tests as recited in independent claims 1, 15, and 16.

Accordingly, Beaven fails to anticipate every recitation of independent claims 1, 15, and 16. Furthermore, based at least upon their dependency to claims 1, 16, and 21, claims 2-14 and 17-20 are not anticipated by Beaven. For at least these reasons among others, Applicants respectfully request that the Panel instruct the Examiner to withdraw the rejections under 35 U.S.C. § 102, and pass claims 1-20 to allowance.

The rejection failed to address all elements of independent claim 21.

Similar to claims 1, 15, and 16 discussed above, claim 21 recites a processor initiates the simultaneous execution of a performance test between a first device and a second device over each of the first and second transport networks simultaneously. As discussed above, Beaven fails to disclose the simultaneous execution of a performance test between a first device and a second device over each of the first and second transport networks simultaneously, at best disclosing execution of performance tests from multiple points.

The Examiner further relied on Mayton to reject independent claim 21. *See* Final Office Action, page 15. However, Mayton fails to obviate the deficiencies of Beaven. Mayton appears to be directed to periodic testing of network performance that may be
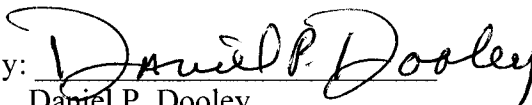
measured against a baseline value. *See* Mayton, Abstract. However, as Mayton fails to teach a processor initiates the simultaneous execution of a performance test between a first device and a second device over each of the first and second transport networks simultaneously, Mayton cannot overcome the deficiencies of Beaven.

As such, the prior art of record, taken alone or in hypothetical combination, fails to teach or suggest all elements of independent claim 21. Furthermore, based at least upon their dependency to claim 21, claims 22-29 are not obvious in view of the cited prior art. For at least these reasons among others, Applicants respectfully request that the Panel instruct the Examiner to withdraw the rejection under Section 103 of independent claim 21, and further request allowance of independent claim 21, as well as all claims depending therefrom.

Conclusion

In view of the above remarks, Appellants respectfully request that the Panel instruct the Examiner to withdraw the outstanding rejections under 35 U.S.C. § 102 and 35 U.S.C. § 103 and allow the pending claims.

Respectfully submitted,

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